



**US Army Corps
of Engineers**

Omaha District

PUBLIC NOTICE

Subject: Administrative Complaint and Proposed Penalty
Permittee: Hogan Development Company
Waterway: Tributary of the Big Papillion Creek
Issue Date: November 18, 2003
Expiration Date: December 17, 2003

30 DAY NOTICE

Nebraska Regulatory Office

8901 S. 154 Street

Omaha, NE 68138-3621

SPECIAL PUBLIC NOTICE ADMINISTRATIVE COMPLAINT

And

PROPOSED PENALTY

HOGAN DEVELOPMENT COMPANY, OMAHA NEBRASKA

This document constitutes notice to the public that the U. S. Army Corps of Engineer District, Omaha, is proposing the following civil penalty to be assessed against Hogan Development Company. This proposed penalty is the results of an investigation of an alleged violation of permit conditions regarding Department of the Army permit number 2000-10129

This proposed administrative penalty assessment has been developed in compliance with Section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)) and the procedures outlined for Class I Civil Penalties as provided in 33 CFR Part 326 dated December 8, 1989.

Findings of Fact

Hogan Development Company is a for-profit organization that owns and/or controls property subject the Department of the Army permit number NE 2000-10129. The specific activities (conditions) determined to be in non-compliance with Department of the Army permit number NE 2000-10129 and that are a part of this administrative process are as follows:

- 1) Failure of Hogan Development Company to request and obtain a permit extension which is in non-compliance with General Condition #1
- 2) Failure of Hogan Development Company to construct the required mitigation before the permit expired, which is in non-compliance with General Condition # 2.
- 3) Failure of Hogan Development Company to obtain and record a deed restriction for the 80-foot buffer area along the west side of the development which is in non-compliance with Special Condition # 5.

These non-compliance issues were raised as the result of a routine compliance inspection conducted on September 24, 2003. A notice of non-compliance was sent to Hogan Development on October 7, 2003. A meeting with representatives of Hogan Development Company and the Omaha District Corps of Engineers Regulatory Branch was held October 20th, 2003.

Laws and Regulations

The unnamed tributary of the Big Papillion Creek is a water of the United States within the meaning of 33 CFR Part 328.3(a) and a "navigable water" within the meaning of Section 502(7), 33 U.S.C. 1362(7) of the Clean Water Act.

The materials used for fill in the jurisdictional tributary associated with the filling of the tributary constitute "pollutants" within the meaning of Section 502(6), 33 U.S.C. 1362.6 of the Clean Water Act. Examples of a pollutant include, but are not limited to, dredged spoil, solid waste, earthen materials, incinerator residue, discarded equipment, concrete, rock, and sand. The discharge of such pollutants is defined as "any addition of any pollutant to navigable waters from any point source" [Section 502(14) of the Clean Water Act, 33 U.S.C. Section 1362(14)].

The equipment discharging this material under all three permits is a "point source" within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. Section 1362(14). A point source is defined as "any discernable, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged".

Hogan Development Company is a "person" within the meaning of the Clean Water Act, Section 502(5), 33 U.S.C. 1362(5).

The Clean Water Act, Section 301, U.S.C. Section 1311, prohibits the discharge of dredged or fill material by a person from a point source into a water of the United States without a permit from the Corps of Engineers in accordance with the Clean Water Act, Section 404, 33 U.S.C. 1344. Work that is carried out that does not conform to the authorization as granted may be subject to suspension and revocation as well as legal action (33 CFR Part 326).

The assessment of a Class I civil penalty by the Omaha District, Corps of Engineers as referenced above is authorized under 33 CFR, Part 326 dated December 8, 1989.

Assessment of the Civil Penalty

Based upon the foregoing facts and pursuant to Section 309(g) of the Clean Water Act, the Omaha District, Corps of Engineers is issuing a Proposed Order to Hogan Development Company recommending the assessment of a Class I civil penalty of \$25,000 for the following permit non-compliance.

- 1) A penalty of \$5,000 is proposed for the failure of Hogan Development Company to request and obtain a permit extension which is in non-compliance with General Condition #1
- 2) A penalty of \$10,000 is proposed for the failure of Hogan Development Company to construct the required mitigation before the permit expired, which is in non-compliance with General Condition # 2.
- 3) A penalty of \$10,000 is proposed for the failure of Hogan Development Company to obtain and record a deed restriction for the 80-foot buffer area along the west side of the development which is in non-compliance with Special Condition # 5.

The penalties for the permit were determined after taking into account all of the factors identified in Section 309(g) of the Clean Water Act. These factors include, but are not limited to, the importance of the area affected, cumulative environmental impacts, size of area affected, the existence of contaminated dredged material, the relationship to program and statutory goals, knowledge and intent of the violator, economic benefits to the violator, the ability of the violator to pay, and the deterrence value regarding future violations in the area by others. This violation was determined to have a moderate impact on the environment and a potentially significant impact on the program due to the ongoing level of development in the area.

Notice of Availability of the Public Record

The record of this permit action and correspondence associated with this proposed order may be viewed at the Nebraska Regulatory Office of the Corps of Engineers from 9:00 AM to 3:00 PM Monday through Friday effective November 19, 2003 throughout the comment period of this notice. The Nebraska Regulatory Office is located in the Papio NRD Building at 8901 S. 154 Street Omaha, NE 68138-3621

Public Comments

The Corps of Engineers is soliciting comments from the public; federal, state, and local agencies; Indian Tribes; and all other interested parties regarding the application of the Class I civil penalties in this matter, the appropriateness of the proposed penalty and any information that might be material to the proposed resolution of the matter of permit non-compliance.

Any interested party is encouraged to provide comments, both favorable and unfavorable. These comments will be made a part of the administrative record. No comments will be accepted after the conclusion of the 30-day review period. All replies should be sent to the Regulatory Branch, U.S. Army Corps of Engineers, 106 South 15th Street, Omaha, Nebraska 68102. Please direct all questions regarding this penalty to Mr. David LaGrone at the above address or at telephone (402) 221-4320.

Public Hearing and Final Order

During the public interest review period, Hogan Development Company may request a hearing regarding the proposed penalty. Should a hearing be requested and scheduled, any party

submitting comments on the proposed penalty will be afforded the opportunity to present material evidence at the hearing.

In the event that Hogan Development Company does not request a public hearing, the Corps of Engineers will issue the Final Order. Persons or entities who commented on the public notice will be allowed an additional thirty days to request that the Omaha District set aside the Final Order and hold a hearing under the authority of Section 309(g)(8) of the Clean Water Act. Such a hearing request shall only be granted if, in the opinion of the District Engineer, the evidence to be presented is material and was not considered in the preparation of the Final Order.

Any hearing will be held and conducted in accordance with the provisions of the guidance provided on the Class I Clean Water Act Civil Penalty Procedures (33 CFR Part 326, December 8, 1989).